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IN THE

Supreme Court of the United States

October Term, 1943.

No. 1105 146

SAMUEL A. MILLER, as Trustee in Bankruptcy of the Estate of John Barrymore, Bankrupt,

Petitioner,

vs.

ROLAND RICH WOOLLEY,

Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

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No. .....

SAMUEL A. MILLER, as Trustee in Bankruptcy of the Estate of John Barrymore, Bankrupt,

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vs.

ROLAND RICH WOOLLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Hon. Harlan F. Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

May it please the Court:

The petition of Samuel A. Miller respectfully shows to this Honorable Court:

I.

Jurisdiction.

Jurisdiction herein is predicated upon Judicial Code, Section 240-a, as amended by the Act of February 13, 1935, Chapter 229, Section 1, 43 Stat. 936.

Reference is made also to Rule No. 38-5 (b) of the Supreme Court, wherein is specified some of the reasons

which will be considered by the Supreme Court in the exercise of its sound judicial discretion with respect to the issuance of writs of certiorari.

II.

Summary Statement of the Case.

John Barrymore, the noted screen, stage and radio performer, finding himself in financial difficulties, filed a petition under Chapter XI of the Bankruptcy Act on June 5, 1940. [Rec. p. 2.] In addition to secured and unsecured debts, substantial non-dischargeable obligations were due from him to various taxing authorities. [Rec. p. 134.] In order to make an arrangement with his creditors, Barrymore proposed to turn over all of his future earnings to a Receiver appointed by the Court, and in connection therewith filed a petition [Rec. p. 112] wherein he set forth that he was earning approximately five thousand ($5,000.00) dollars a week, and was in the habit of spending one thousand ($1,000.00) dollars a week for household expenses. He requested that the Court make an order allowing the sum of one thousand ($1,000.00) dollars a week for his household expenses and necessities. Such an order was made fixing his drawing account at one thousand ($1,000.00) dollars a week. [Rec. p. 113.]

Shortly thereafter, the guardian and trustee of John Barrymore's minor children requested that there be paid for the benefit of said minor children certain weekly sums, and on August 2, 1940, the Referee made an order increasing the weekly drawing account of John Barrymore, and ordered the Receiver to disburse payments for these purposes. [Rec. p. 117.]

In September of 1940, Barrymore dismissed the attorneys then representing him, and substituted respondent and one Hiram Casey, as his attorneys in place of the attorneys who originally filed the proceedings for him. [Rec. p. 118.] It seems that shortly before respondent's substitution into the case, respondent was consulted by Barrymore in relation to a divorce action that Barrymore contemplated filing against his then wife, Elaine Barrymore [Rec. p. 555], and respondent told Barrymore that the sum of ten thousand ($10,000.00) dollars was a reasonable fee for handling the divorce matter. Subsequently a written agreement was entered into by Barrymore and the respondent covering this particular fee. [Rec. p. 333.] Nothing was discussed at the time the agreement was entered into as to how the ten thousand ($10,000.00) dollars was to be paid. [Rec. p. 556], but payments were made as follows:

September 28, 1940	$750.00
October 29, 1940	250.00
November 1, 1940	500.00
November 15, 1940	500.00
November 26, 1940	500.00
December 5, 1940	500.00
December 11, 1940	200.00
January 2, 1941	250.00
January 16, 1941	200.00
January 27, 1941	300.00
February 14, 1941	200.00
March 11, 1941	500.00
March 19, 1941	500.00
April 5, 1941	300.00
May 2, 1941	500.00

The total of the foregoing payments is five thousand nine hundred fifty ($5,950.00) dollars. [Rec. pp. 345-6.]

During the time these payments were received by respondent the only income of Barrymore was the allowance out of his earnings paid to him by the Receiver under the orders of the Referee, and for a portion of this time respondent was actually receiving Barrymore's weekly allowance from the Receiver and depositing it in a trust account under a power of attorney from Barrymore and applying the same to payment of Barrymore's bills and the ten thousand ($10,000.00) dollar fee which is the subject of this litigation. [Rec. pp. 239-268.]

During this entire time respondent was attorney for Barrymore. Respondent was substituted out of the case in May of 1941 [Rec. p. 220], and the original petition upon which Barrymore sought to recover the money received by respondent for his services in the divorce action was filed on October 3, 1941, by the new counsel chosen by Barrymore. [Rec. p. 214.]

The divorce action which was handled by respondent was a default case [Rec. p. 582], and it was undisputed that no disclosure was ever made to the Referee in Bankruptcy, the Receiver, the creditors, or anyone else entitled to know, regarding the payment of the fee to respondent out of Barrymore's weekly allowance, but the District Judge found that the Referee and creditors had knowledge of the fact that an action for the divorce was pending and therefore should have known that a fee was being paid in some manner, thus holding in effect that the Referee must deal at arms length with the attorney for the debtor and cannot accept his statements of fact as the truth, but is put upon notice and must investigate.

On May 12, 1941, respondent, with his co-counsel, Hiram E. Casey, filed a petition for compensation, setting forth the services performed by them, for which they requested the sum of seven thousand five hundred ($7,500.00) dollars, and in said petition, signed and sworn to by respondent, it was stated that respondent had not received any compensation for his services in the bankruptcy proceedings, save and except the sum of four hundred fifty ($450.00) dollars. [Rec. pp. 203 and 219.] During the course of the divorce action between Barrymore and his wife, Elaine Barrymore, the Referee warned the respondent that the estate and creditors were in no way interested in using the funds of the estate for the divorce matter. [Rec. pp. 378 and 379.]

The Receiver was not a party to the original petition, although Barrymore requested that the return of the funds alleged to have been illegally collected by respondent, be paid to the Receiver. [Rec. pp. 16 and 29.]

Upon the institution of proceedings by Barrymore against respondent, the Receiver requested the Court to instruct him as to whether or not he should become a party to the proceedings [Rec. p. 30], and in the memorandum opinion of the Referee the Receiver was directed to become a party to the proceedings. [Rec. p. 102.]

It is the petitioner's position that respondent fraudulently obtained the continuance of the order for the payment of the weekly allowance, out of which he received from Barrymore the sum of five thousand nine hundred

fifty ($5,950.00) dollars. It is his position that the original petition of Barrymore to fix his drawing account contained the representation that the money was to be used for household expenses and necessities [Rec. p. 113], and that from time to time respondent attempted to account to the Court for the disposition of the weekly allowance and to explain why it should not be cut down and what had been done with the money from week to week, and that in each of these instances respondent had the opportunity to advise the Court that he was receiving substantial sums out of the household funds in order to pay himself a fee, but studiously refrained from revealing the true facts. [Rec. pp. 417, 468, 469, 470, 471, 473, 474, 505, 506.]

Upon the foregoing facts the Referee filed an opinion [Rec. p. 63] and made findings of fact and conclusions of law ordering the repayment of the five thousand nine hundred and fifty ($5,950.00) dollars. [Rec. p. 103.]

A petition for a review of the Referee's order was filed by respondent [Rec. p. 271], and on hearing in the District Court the order of the Referee was reversed. [Rec. p. 335.] An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, and that Court held that the Referee had no jurisdiction to make the order for the reason that upon John Barrymore's death an order of adjudication was made which related back to the date of the filing of the petition, and all of the earnings that had passed into the hands of the Receiver were not subject to administration and jurisdiction in the Bankruptcy Court.

III.
Issues Involved.

1. Does an order of adjudication in bankruptcy, entered by reason of the abandonment or default of the debtor under a plan of arrangement filed under Chapter XI, which has been accepted by the creditors and approved by the Court, have the effect of nullifying previous proceedings under the plan of arrangement to the extent that all sums paid to the Receiver from the earnings of the debtor, in the operation of the plan, become the property of the debtor by reason of the fact that under Section 378 of the Act (11 U. S. C. A. 778) the adjudication relates back to the date of the filing of the original petition?

2. Did the Referee in Bankruptcy have summary jurisdiction to order the payment by the respondent, who was the attorney for the debtor, to the Receiver of funds obtained from the Receiver by fraud?

3. Where it is undisputed that respondent at no time disclosed to the Referee and the creditors that large sums from the allowance to the debtor for living expenses were being paid to respondent to apply upon the divorce fee, and made many representations that such allowance was necessary for the debtor's living expenses, and the Referee made statements from the bench and findings of fact that had he known that the allowance to the debtor for living expenses was so excessive as to permit large payments to be made to the respondent the allowance would have been

reduced, may the District Judge reverse the findings of the trial court thus based upon undisputed facts?

4. Is not a contract by a debtor without the approval of the Court, while a proceeding under Chapter XI of the Bankruptcy Act is pending, and the property of the debtor is in *custodia legis*, void, and are not payments made on such contract recoverable?

IV.

Reasons Relied on for the Allowance of the Writ.

A. The Circuit Court of Appeals for the Ninth Circuit Has Decided an Important Question of the Federal Benkruptcy Law, Which Has Not Been, But Should Be, Finally Settled by the Supreme Court of the United States.

There has been no definite decision by the Supreme Court of the United States on the question involved in this case. Here we have a situation where debtor turned over all his earnings to a receiver, and, after the approval of his plan, died, so the plan could not be consummated according to its terms. The referee, pursuant to the Bankruptcy Act, adjudicated the debtor a bankrupt. The question now raised is whether or not all of the earnings of the debtor subsequent to the date of the filing of his petition, under Chapter XI, would have to be returned to the debtor if he was alive and had abandoned the plan, or to his personal representative in the event of his death, and thus oust the bankruptcy court of jurisdiction.

B. The Decision by the Circuit Court of Appeals for the Ninth Circuit Is in Conflict With the Decision of the Circuit Court of Appeals of the United States for the Second Circuit in the Case of Governor Clinton, Inc. v. Knott, *et al.*, 129 Fed. (2d) 149.

In that case the Circuit Court of Appeals ordered repaid to the estate in bankruptcy certain secret profits which were obtained as the result of a fraud upon the Court, and summary jurisdiction was approved as a proper means of bringing the assets back into the bankrupt estate.

The decision of the Circuit Court of Appeals, for the Ninth Circuit, in the instant case is also contrary to a District Court decision in the case of *In re Breinig*, 40 F. Supp. 29.

V.

Brief in Support of This Petition.

Attached to this petition and as a part of the same is a brief in support thereof.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the said Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Honorable Court for its review and determination, on a day to be named therein, a full and complete transcript of the record and all proceedings in the case numbered 10460 in that Court, and entitled "Samuel A. Miller, as Trustee in Bankruptcy of the Estate of John Barrymore, Bankrupt, Appellant, vs.

Roland Rich Woolley, Appellee," and that its judgment therein made on March 20, 1944 may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated at Los Angeles, California, this 31st day of May, 1944.

SAMUEL A. MILLER,

Petitioner,

BERTRAM H. ROSS,
B. E. AHLPORT, and
EARL E. MOSS,
By EARL E. MOSS,

His Counsel.

Certificate of Counsel.

I hereby certify that I am one of the counsel for the petitioner in the above-entitled cause, and that in my judgment the foregoing petition is well founded in law and fact, and that said petition is not interposed for purposes of delay.

Dated this 31st day of May, 1944.

EARL E. MOSS,

Of Counsel for Petitioner.